Supreme Court, U.S.
FILED
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No.

In The

SUPREME COURT OF THE UNITED STATES

STEPHEN SIMON,
Petitioner

v.

VALUE BEHAVIORAL HEALTH INC. ET AL,
Respondent(s)

On Petition For a Writ of Certiorari to
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN SIMON,
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65pp

QUESTION(S) PRESENTED FOR REVIEW

I. Whether an assignment of benefits and/or assignment of cause of action to a healthcare provider from a "participant" of a Employee Retirement Income Security Act ("ERISA") health and welfare plan and who [provider] subsequently reassigns to a "creditor" with UCC holding who [creditor] subsequently brings a legal action individually and as assignee of assignor [provider] against an ERISA plan for denial of ERISA benefits pursuant to 29 U.S.C. § 1132 alleging either vested interest, colorable claim, derivative standing and/or beneficiary status is sufficient to proceed with such claims for relief and with standing to sue in the United States District Court?

II. Whether the defined term "beneficiary" pursuant to 29 U.S.C. § 1002(8) wherein it refers to the term "designate" and since according to Black's Law Dictionary is synonymous with Black's Law defined term "appoint" that in turn is synonymous or interchangeable with Black's Law defined term "assign" and, as such, does an assignee with assignment of benefits and assignment of cause of action so designated by a "participant" of an ERISA health and welfare employee benefit plan and based upon the plain natural language reading of the Black's Law defined terms "beneficiary", "appoint", and "assign" constitute congressional intent that such similarly situated "assignees" are equivalent to "beneficiaries" and, as such, are enumerated parties pursuant to 29 U.S.C. § 1002(8) with standing to sue in the United States District Court?

III. Whether the defined term "beneficiary" pursuant to 29

U.S.C. § 1002(8) wherein it states, "...or by the terms of the employee benefit plan...or may become entitled to a benefit thereunder" and when any given ERISA health and welfare employee benefit plan does not prohibit or otherwise allow for assignability or to the extent assignment(s) are allowed or silent under the terms thereunder, then can such an assignee with a valid assignment(s) of either assignment of benefits and/or an assignment of cause of action proceed as a "beneficiary" based on the plain natural reading of the statute with standing to sue and is consistent with congressional intent?

IV. Whether a holding by a U.S. District Court or Appellate Court in dismissing or affirming a dismissal of a complaint for lack of standing to sue for denial of benefits of a ERISA health and welfare plan when the Petitioner is an ultimate assignee of the "participant" of the said ERISA plan with valid assignments of accounts receivable and assignment of cause of action and who has plead a vested interest, colorable claim, derivative standing, and/or beneficiary status arising out of creditor status with UCC filings and/or purports to be a beneficiary by assignment, constitutes a violation of the United States Constitution including but not limited to Article III by depriving due process to the Courts for redress including preemption of state law or common law unlawful taking of private property without due process to the Courts for redress and considering ERISA preemption of state law and/or common law causes of action that collectively constitute the unlawful taking of private property without due process?

V. Whether the federal courts have sufficiently established a broad enough "judicial exception" by only allowing

healthcare providers standing to sue against an ERISA employee health and welfare plan while depriving other qualified citizens who have vested rights and interests individually and/or by assignment to seek redress for their respective damages and losses in the federal courts after statutory preemption of state law causes?

VI. Whether the federal courts establishment of judicial exception of "healthcare providers" granting derivative standing to sue under present federal common law is limited to healthcare providers who actually provided the services as opposed to healthcare providers who obtained assignments from those providers and in contrast to attorneys who can openly trade and share commissions amongst themselves without any restrictions and/or prohibitions?

VII. Was the Petitioner in the Simon vs. Value matter improperly precluded from obtaining service of process of hundreds of employee benefit plans when service of process was properly effectuated upon "administrators and/or trustees" of those respective ERISA plans pursuant to 29 U.S.C. § 1132(d)(1) and after Judge Gary L. Taylor of the United States District Court, Central District of California missed interpreted the plain natural reading of that statute and/or refused or failed to consider the contractual terms of each of the respective 600 employee benefit plans at issue and was subsequently affirmed without comment by the U.S. Ninth Circuit of Appeals resulting in substantial losses and damages due to the running of the statute of limitations and pending adjudication from the Appellate Court?

VIII. Was the Petitioner in the Simon vs. Value matter improperly prejudiced by the orders of the Honorable Judge Gary L. Taylor that resulted in severe prejudice to this pro se litigant that who should have been entitled under federal common law and case law to "liberal construction of pleadings" but instead was discriminated against and chastised by the Court for bringing the action against so many Respondents and who subsequently all of the estimated 1,600 Respondents except for one in what apparently was based upon his own personal case management issues?

IX. Whether the United States District Court retains jurisdiction of an ERISA cause of action against a health and welfare employee benefit plan irregardless of whether the Plaintiff was deemed to be the "real party in interest" pursuant to Fed.R.Civ.P. 17(a) and otherwise deprive all parties of equitable redress including the actual real party in interest while subjecting all of the Petitioner parties in interest to res judicata and/or collateral estoppel doctrine?

X. Did the U.S. Ninth Circuit Court of Appeals have appellate jurisdiction since the lower court did not adjudicate the FEHBA claims in any of the lower cour's orders and because there was no final order in the lower court?

XI. Whether or not the holding of the U.S. Ninth Circuit Court of Appeals should stand in light of allegations generally characterized as discrimination, impropriety(s), suppression of information/evidence, obstruction of the administration of justice and other acts and omissions that are generally characterized as prejudicial and bias and/or contrary and/or

inconsistent with the Federal Rules of Appellate Procedure, U.S. Ninth Circuit Court Rules, Federal Statutes, Congressional Acts, and Codes of Judicial Conduct subject to the Judicial Council's affirmation in part or whole pursuant to proceedings presently pending pursuant to 28 U.S.C. § 372(c)(1) as amended by § 402(a) of the Judicial Discipline and Removal Reform Act of 1990?

XII. Did the U.S. Ninth Circuit Court of Appeals panel overlook or ignore conflicting case law within the Ninth Circuit that would have otherwise given good cause to reverse and/or remand to the lower court including but not limited to Davidowitz vs. Delta Dental Plan Inc., 946 F.2d 1476 (9th Cir. 1991) and other Supreme Court holdings including but not limited to Fentron Industries et al vs. The National Shopmen Pension Fund et al, 674 F.2d 1300, 1982 U.S. App. LEXIS 19924 and Haynes vs. Kerner et al, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 653 (1972)?

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: Guardian Life Insurance Company of America; Value Health Inc.; Robert E. Patricelli; American PsychManagement, Inc.; Preferred HealthCare, Ltd.; Health Management Strategies International, Inc.; The Prudential Insurance Company of America; HealthCare Systems, Inc.; Health Risk Management; Health Insurance Association of America; John Hancock Mutual Life Insurance Co.; CostCare, Inc.; John Hancock Mutual Life Insurance Company Employee Benefit Plan; Blue Cross & Blue

Shield Association; Blue Cross & Blue Shield of Illinois, Inc.; Blue Cross/Blue Shield of Iowa, Inc.; Blue Cross/Blue Shield of Kansas, Inc.; Blue Cross/Blue Shield of Massachusetts, Inc.; Blue Cross/Blue Shield of Michigan, Inc.; Empire Blue Cross/Blue Shield; New York Life Insurance Company; Blue Cross/Blue Shield of Texas, Inc.; Administrator and/or Trustee on behalf of Paune Extrusions Company Employee Benefit Plan; Blue Cross/Blue Shield of Virginia, Inc.; Administrator and/or Trustee on Behalf of Commonwealth University Employee Benefit Plan; Metro Inc. Information Services Employee Benefit Plan, Department of Motor Vehicles of the Commonwealth of Virginia Employee Benefit Plan, Linsky Plan Farm, Inc. Employee Benefit Plan, Memorial Hospital, Inc. Employee Benefit Plan; Virginia Polytechnic Institute and State University Employee Benefit Plan, Campbell County Transport Employee Benefit Plan, State of Virginia Employee Benefit Plan, Hodgerman's Company Employee Benefit Plan; American General Life & Accident Insurance Co., Administrator and/or Trustee on behalf of American General Life & Accident Insurance Co. Employee Benefit Plan; Benefit Trust Life, Administrator and/or Trustee on Behalf of Lagrange Country Club, Inc. Employee Benefit Plan, Wood Tech, Inc. Employee Benefit Plan; Blue Cross of Alaska; Blue Cross of Washington; Specialty Medical Clinic Employee Benefit Plan, Bell Atlantic Corporation; C & P Telephone; Tuthill Corporation; FKW, Inc.; Blue Cross/Blue Shield of Minnesota; Blue Cross/Blue Shield of Maine; Bankers Life and Casualty Company; National Association of Health Underwriters; City of Lewiston School Department; ReliaStar Life Insurance Company; PPG Industries Inc.; Ventura Insurance Administrators, Inc.; Ventura County Foundation for Medical Care, Inc.; A & P Grocery Store, Inc., A & P Grocery Store, Inc. Employee Benefit Plan; Crawford Insurance Company; Security Benefit Trust Fund, Roofers Local 149 Security Benefit Trust Fund; Roofers Local 149 Employee

Benefit Plan; ITT Hartford Group, Inc.; ITT Hartford Group, Inc., as Administrator and/or Trustee; General American Life Insurance Company; Genelco; Pan-American Life Insurance Company; National Insurance Services; David Koppe; William McGuire, M.D.; MetraHealth Care Management Corporation; United HealthCare Corporation; United HealthCare Corporation Employee Benefit Plan; United HealthCare Services, Inc.; United Behavioral Systems, Inc.; Operating Engineers Local 37 Health and Welfare Fund; CappCare, Inc.; Michael Henry; Health International, Inc.; Health International Corporation; Stanislaus Foundation for Medical Care; Executive Risk; Benefit Panel Services; Great-West Life Assurance Company; Rocky Mountain Medical Services dba Blue Cross and Blue Shield of Colorado; Carpenters Health and Welfare Trust for Southern California, Carpenters; Pension Trust for Southern California; Carpenters Southern California Administrative Corporation; Millwrights Local Union No. 1607; Carpenters Local Union No. 1506; Chicago District Council of Carpenters Welfare Fund; Chicago District Council of Carpenters Pension Fund; Retail Clerks-Employers Benefit Plan of Northern California and Valley Clerks Trust Fund; CT Corporation, CSC The United States Corporation; Blue Cross/Blue Shield of California; Metropolitan Life Insurance Company, Administrators and/or Trustee on Behalf of: Chemical Bank Inc. Employee Benefit Plan; New York State Frewway Authority Employee Benefit Plan, New York State Department Civic Employee Benefit Division, Sun Chemical Corporation Employee Benefit Plan, Dunn & Bradstreet Employee Benfeit Plan, Rockwell International, Inc. Employee Benefit Plan, ZEP Manufacturing Company Employee Benefit Plan, National Services Industreis, Inc. Employee Benefit Plan, F.W. Woolworth Company Employee Benefit Plan, Nordstrom's Inc. Employee Benefit Plan; Town of New Paltz Employee Benefit Plan; Trustees of the American Engineers Council Insurance Trust Fund; Felker Benefit Services; Pepsico

Inc. Employee Benefit Plan; Ukiah Unified School District Employee Benefit Plan; Louisiana-Pacific, Inc. Employee Benefit Plan, General Electric Company Employee Benefit Plan; City of Culver Employee Benefit Plan; California Conservation Corp. Employee Benefit Plan; Allcare Plan; Transport International Tools Inc. Employee Benefit Plan; Wood Company Employee Benefit Plan; Montgomery Ward Inc. Employee Benefit Plan; R.H. Macy's Inc. Employee Benefit Plan; McDonough Capperton, Inc. Employee Benefit Plan; MetraHealth; Unified Behavioral Systems, Inc.; National Association of Underwriters; Southwestern Bell Employee Benefit Plan; Universal City Studios Inc.; Universal Studios Employee Benefit Plan; Mutual of Omaha; HealthCare Compare Corporation; Health Risk Management Inc.; Benefit Administrators Inc.; Care America, Inc.; Uniformed Service Benefit Plan; U.S. Postal Service; Yuma Proving Ground; U.S. Army; U.S. Marine Corps; U.S. Navy; U.S. Air Force; U.S. Coast Guard; United States of America; First Health Inc.; Blue Cross/Blue Shield of Alabama; Service Master Inc. Employee Benefit Plan; Gary Methodist Hospital Inc.; Gary Methodist Hospital, Inc. Employee Benefit Plan; Lewiston School; Maine State Correctional Institution Employee Benefit Plan; Blue Cross/Blue Shield of Oregon, Inc., Administrator and/or Trustee on behalf of Safeway Stores, Inc. Employee Benefit Plan; Painters Local 10 Employee Benefit Plan; John Q. Hammonds Hotels, Inc. Employee Benefit Plan; Adventist Health System of Loma Linda, Administrator and/or Trustee on behalf of Loma Linda School of Medicine Health Assistance and Medical Personnel Services Plan; United Chambers Insured Plans; American Community Mutual Insurance Co.; American Trust Administrators; Automotive Industries Welfare Fund Medical Plan; Brown Group Insurance Co., Administrators and/or Trustee on behalf of Brown Group Insurance Co. HealthCare Plan; Bankers Life & Casualty Company, Administrator and/or on behalf of City of Chicago

Employee Benefit Plan; The Vollrath Company, Inc.; The Vollrath Company, Inc. Employee Benefit Plan; Chubb Life America; Comparative Ins Serv; McDonnell Douglas Corp/Douglas Aircraft Company; Screen Actors Guild-Producers Pension Plan; Swim Chem Products Inc.; Great Lakes Chemical Bank Inc; BL Network Inc. Employee Benefit Plan; Group Resources Inc.; Harcourt Brace Jovanovich, Inc.; Health Economics Corporation; City/County of San Francisco; Insurnational Insurance Administrators, Inc.; Intermountain Administrators, Inc.; Laborers Health & Welfare Trust for Southern California; McDowell Agency, Inc.; Mutual Assurance; San Francisco Print Industry Welfare Fund; Newspaper & Periodical Driver's & Helper's Union Local 921-Publisher's Welfare Trust; Pavers and Road Builders District Council Welfare Fund; Jack Wickware; IBEW-NECA Southwestern Health and Benefit Fund; Wal-Mart Inc.; Wal-Mart Inc. Associates Group Health Plan; State Farm Mutual Automobile Insurance Company; Group Health Incorporated; Federated Mutual Insurance Company; European Car Parts, Inc. Employee Benefit Plan; F.W. Woolworth Co.; F.W. Woolworth Co. Employee Benefit Plan; Paula Assurance Co.; Pan American Underwriters Inc.; Gallagher Bassett Services Inc.; Employees Benefit Administration and Management Corporation; Milk & Ice Cream Employees Welfare Plan; Blue Cross/Blue Shield of Delaware; Blue Cross Blue Shield of Indiana; Blue Cross Blue Shield of Kentucky; Blue Cross Blue Shield of New Jersey; Blue Cross Blue Shield of Connecticut; United Assurance Company; NALC Health Benefit Plan; Indian Child Protective Services; Northern Indiana State Developmental Center; Columbia HCA HealthCare Corporation; United Assurance Company of America.

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Fentron Industries et al vs. The National Shopmen Pension Fund et al, 674 F.2d 1300, 1982 U.S. App. LEXIS 19924 .....
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Black's Law Dictionary (Sixth Edition) .....
Article III of the Constitution of the United States .....

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Stephen Simon vs. Value Behavioral Health Inc. et al.*, 208 F.3d 1072 (9th Cir. 2000).

The opinion of the United States District Court for the Central District of California is reported at *Stephen Simon vs. Value Behavioral Health Inc. et al.* 955 F.Supp. 973 (C.D. Cal. 1997).

STATEMENT OF JURISDICTION

The date on which the United States Ninth Circuit Court of Appeals decided my case was on June 7th, 2000.

A timely petition for rehearing was denied by the United States Ninth Circuit Court of Appeals on the following date: June 7th, 2000, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

15 U.S.C. § 12 (RICO)
18 U.S.C. § 1961
18 U.S.C. § 1961(3)
18 U.S.C. § 1961(4)
18 U.S.C. § 1962
26 U.S.C. § 665
28 U.S.C. § 372(c)(1)
28 U.S.C. § 402(a)
28 U.S.C. § 1291
28 U.S.C. § 1331
28 U.S.C. § 1332
28 U.S.C. § 2107(b)
29 U.S.C. § 1001(b)
29 U.S.C. § 1002(1)
29 U.S.C. § 1002(2)(A)
29 U.S.C. § 1002(8)
29 U.S.C. § 1002(16)(A)
29 U.S.C. § 1056(d)
29 U.S.C. § 1056(d)(1)
29 U.S.C. § 1132(a)
29 U.S.C. § 1132(a)(1)
29 U.S.C. § 1132(a)(1)(B)
29 U.S.C. § 1132(d)(1)
29 U.S.C. § 1132(e)(2)
Fed.R.Civ.P. Rule 4(a)
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Fed.R.Civ.P. Rule 21
Fed.R.Civ.P. Rule 25
Fed.R.Civ.P., Rule 56
Article III of the Constitution of the United States of America
Fed.R.App.P. 35(b)
Fed.R.App.P. 35(c)
RICO § 2(b)

STATEMENT OF THE CASE

Petitioner asserts that the record will clearly show that the U.S.D.C.J. unreasonably and unfairly ruled against the Plaintiff at almost every juncture.

The U.S.D.C.J.'s holding that dismissed the ERISA cause of action based on Plaintiff's standing was akin to *"cutting out the heart"* of what was the *"hub of the wheel"* of this lawsuit that gave rise to the other causes of action.

The U.S.D.C.J. improperly dismissed all of the Defendants (except one) based on *"case management"* and notwithstanding Judge Taylor's acknowledgment that the Defendants did, in fact, have one thing in common, *"common denial of this kind of claim"*.

The Honorable Judge Taylor repeatedly expressed his frustration over the magnitude of the number of Defendants and their counsel along with the prospect of confronting the practicalities of this complex litigation and chose to take the path of least resistance by dismantling Plaintiff's lawsuit.

In the last hearing Judge Taylor specifically addressed the members of the Ninth Circuit as if the record on appeal would not be sufficient to reveal whether or not justice had actually been served and stated,

> *"For the benefit of my good friends at the Court of Appeals...First of all this is not a situation in which a pro per is not being afforded an opportunity to amend. We have done that over and over and over with what I think is a very careful and thoughtful explanation by the Court as to what he needs to...the plaintiff thinks that for these insurers to deny payments of these claims is illegal. And what the Court has held is that it's not illegal and what they are doing is what they normally do as insurers and they're not required by law to cover this kind of a claim..."*

Upon reflection of this case, there are many remaining unanswered questions as to how and why the Honorable Judge Gary Taylor could have reasonably come to the conclusions that led to his rulings including but not limited to:

(a) why from the beginning of the proceedings was Judge Taylor so impatient with the Petitioner including unreasonably refusing to allow adequate time to serve over 1,600 Respondents and instead actually shortened the time?

(b) why did Judge Taylor quash Petitioner's service of process upon hundreds of ERISA plans without apparent regard to the ERISA statute or proper review of the ERISA plan documents and despite Petitioner's opposition(s)?

(c) why did Judge Taylor refuse to allow Petitioner to discover crucial evidence that would have enabled Petitioner

to supplement his pleadings and provide factual and convincing documentation and instead ruled that the pleadings were insufficient?

(d) why did Judge Taylor refuse to certify Petitioner's motion for interlocutory appeal despite Judge Taylor's invitation to the Ninth Circuit Court for intervention when he stated *"without further authority from the Ninth Circuit"*?

(e) why did Judge Taylor continue to search for reasons outside of Petitioners' pleadings as to those conspiracy allegations involving hundreds of ERISA plans, employers, insurance companies, and affiliated entities instead of accepting as true Plaintiff's pleadings within the four corners of the complaint(s)?

(f) why was Judge Taylor convinced that the professional services rendered by Petitioners' Assignors were somehow different from standard professional mental health services exemplified by the U.S.D.C.J.'s statement *"But the reason, the basis, the unusual nature of the care that form the basis for non-payment was what? What was the nature? – ..."* and despite Plaintiff's response to same, *"...Your Honor, the care that was provided was traditional care except for the philosophy was holistic. All of the providers are licensed psychiatrists, psychologists, marriage and family counselors."*

(g) why and how did Judge Taylor reasonably conclude that, *"...they're [insurers] not required by law to cover this kind of claim..."*? especially in light of Petitioner's pleadings including alleged fraudulent fee fixing and wholesale denial(s) of claims involving over 638 separate ERISA claims?

(h) why did Judge Taylor rule against Plaintiff's alleged conspiracy(s) amongst all of the Respondents despite his own

acknowledgment that there was at the very least a *"common denial of this kind of claim"*?

(i) why did Judge Taylor dismiss all of the estimated 1,600 Respondents (except one) sua sponte based on *"case management"* and refused to consider Petitioner's motion(s) to rejoin Respondent(s) when the U.S.D.C.J. surely must have known that these dismissals would be fatal to Petitioner's lawsuit based on the statute of limitations?

(j) why did Judge Taylor refuse to accept Petitioner's pleadings as true on the face of it and instead appeared confused over many of the allegations and issues of fact while emanating a profound sense of disbelief along with expressing recurring statements of ambivalence over the magnitude of the proceedings?; and

(k) why did Judge Taylor diminish Petitioner's pro se status instead of granting the due and proper latitude normally extended to pro se litigants including liberal construction of pleadings?

In conclusion, I believe that the Supreme Court Justices will determine that justice has not been served as they attempt to answer these and other questions. The Petitioner also trusts that the Supreme Court Justices will grant further *"authority"* so that Petitioner's ERISA standing to sue can be established as a matter of consistent with other related Court of Appeals case law and in accordance with Judge Taylor's proviso *"without further authority from the Ninth Circuit"*.

The Petitioner also remains confident that given a fair and reasonable opportunity to replead all of the causes of action and to supplement same with evidence obtained through discovery that he can and will proceed on to the

merits of the case.

Finally, this is definitely a case that was prematurely and unjustly aborted at the pleading stage. It should also be fairly clear that justice cannot be served when a District Court suppresses vital evidence while simultaneously misapplying statutory provisions and Federal Rules of Civil Procedure including the basic premise of acceptance of Plaintiff's pleadings as true on the face of it along with the total disregard of Petitioner's fraudulent conspiracy allegations and other properly plead allegations.

This is also a case where the District Court has not extended liberal construction to pro se pleadings or other similar applications. Instead, the District Court was unreasonably strict with the Petitioner even in the face of overwhelming opposition in terms of the total numbers of Respondents and their respective counsel along with the vast resources that they have collectively assembled. Therefore, I firmly believe that the Supreme Court will agree that justice, fairness, and reasonableness have not triumphed in this case.

Petitioner respectfully reminds the Supreme Court Justices that this case goes far beyond justice for the Respondent. In fact, should the Supreme Court affirm the Court of Appeals ruling on Petitioner's ERISA standing to sue, that would significantly narrow the scope of those prior holdings of the Ninth Circuit Court of Appeals consistent with expanded rulings on ERISA standing to sue and, as such, would establish an alarming and conflicting precedent. In addition, an adverse ruling at this juncture would encourage those Respondents to continue their unlawful activities that have significantly restrained and adversely impacted the entire mental health profession along with tens of thousands of patients who are participants and beneficiaries of ERISA

plans while simultaneously enabling those co-conspiring Respondents to escape justice.

The Petitioner greatly appreciates the opportunity that our United States judicial system affords litigants to appeal unjust, unfair, and adverse rulings and is now hopeful that this Supreme Court Justices of the United States Supreme Court will find favor in Petitioner's appeal and in the preservation of justice for one and for all.

The Petitioner looks forward to the appointed time and place to personally appear for the purpose of oral presentation before the Supreme Court Justices of the United States Supreme Court in God speed.

REASONS FOR GRANTING THE PETITION

Petitioner is aware of the chances of the United States Supreme Court granting a Petition for Writ of Certiorari that rarely occurs in cases of such imperative public importance. In *Simon vs. Value Behavioral Health*, the U.S. District Court's denial of Plaintiffs' standing to sue and the U.S. Ninth Circuit affirmation is symptomatic of yet another greater problem that exists in the United States of America and what is increasingly becoming the general public's perception that insurance companies and their ERISA Plan clients are not only beyond the reach of the law by and through the judicial interpretation's of standing to sue and access to due process for protection of their respective rights and interests, but also the increasing public outrage against these insurance companies and related entities for their willful and wanton disregard for the law and

what appears to be widespread judicial protectionism. (See USA Today Cartoon caricature 1999 attached hereto as Appendix D). It is high time that the United States Supreme Court sent a clear and resounding message to the lower court's that the citizens must have access to the Courts to redress the wrongs of these insurance companies and ERISA entities and to demonstrate that these entities are not above and beyond the law or "favorite sons" of the judiciary and privileged members of the Bar Association and that they must be held accountable for their acts, omissions, and widespread failure to make good on their contractual obligations and fiduciary responsibilities. The time is at hand for the United States Supreme Court to set the record straight as to fairness, equity, and justice for all.

CONCLUSION

Petitioner respectfully requests that the United States Supreme Court first consider the fact that this Lawsuit and subsequent appeal out of necessity has been brought in good faith. The Petitioner has also been diligent in his compliance with the F.R.C.P., F.R.A.P., Circuit Rules, and the Courts' orders, notwithstanding the fact that Petitioner has made his appearances In Propria Persona.

The Petitioner has alleged in the Lawsuit that he, as an individual and the ultimate assignee of assignors and, as such, has standing to bring those causes of action including the ERISA claims. However, the Honorable Gary L. Taylor first determined that the ERISA cause of action should not proceed "without further authority from the Ninth Circuit" and then subsequently dismissed all of the estimated 1,600 Defendants and finally the single remaining Defendant with prejudice in

the Third Amended Complaint.

In sum, the Supreme Court has been summoned to determine whether or not Petitioners' collective arguments of law and contentions of facts, as set forth herein, are sufficient to vacate, reverse, and/or remand for further proceedings.

Secondly, the Petitioner has suffered significant personal financial losses and damages to his twenty (20) year career in the mental health field. Whereas, this Lawsuit constitutes the Petitioner's only available legal remedy for equitable and injunctive relief and, as such, Petitioner prays for justice and an opportunity to present his evidence before the United States Supreme Court as promised in the Constitution of the United States of America.

The Supreme Court Justices have been assigned the authority to oversee this judicial process and, as such, "stands in the shoes" of the proverbial watchman and as "shepherds" over the flocks.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN SIMON, Petitioner
In Propria Persona

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Dated: November 9, 2000

Appendix A

208 F.3d 1073
2000-1 Trade Casese P 72.822, RICO Bus.Disp.Guide 9856, 24 Employee Benefits Cas. 1208,
00 Cal. Daily Op. Serv. 2120, 2000 Daily Journal D.A.R. 2903
(Cite as: 208 F.3d. 1073)

United States Court of Appeals,
Ninth Circuit

Stephen SIMON, an individual and as assignee of assignors, Plaintiff-Appellant,

v.

VALUE BEHAVIORAL HEALTH INC., Guardian Life Insurance Co. of America; Value Health, Inc.; Robert E. Patricelli, Ltd.; America Psychmanagement, Inc; Preferred Healthcare, Ltd.; Health Management Strategies International Inc; The Prudential Insurance Company; HealthCare Systems, Inc.; Health Risk Management, Health Insurance Association of America; John Hancock Mutual Life Insurance Co.; John Alden Life Insurance Company; Costcare, Inc; John Hancock Mutual Life Insurance Company Employee Benefit Plan; Blue Cross & Blue Shield Association; Blue Cross & Blue Shield of Illinois, Inc.; Blue Cross/Blue Shield of Iowa, Inc.; Blue Cross/Blue Shield of Kansas, Inc.; Blue Cross/Blue Shield of Massachusetts, Inc.; Blue Cross/Blue Shield of Michigan, Inc.; Empire Blue Cross/Blue Shield; New York Life Insurance Company; Blue Cross/Blue Shield of Texas, Inc., Administrator and/or Trustee on Behalf of Paune Extrusions Company Employee Benefit Plan; Blue Cross/Blue Shield of Virginia, Inc. Administrator and/or Trustee on Behalf of Commonwealth University Employee Benefit Plan, Metro Inc. Information Services Employee Benefit Plan, Department of Motor Vehicles of the Commonwealth of Virginia Employee Benefit Plan, Linsky Plant Farm, Inc. Employee Benefit Plan, Memorial Hospital, Inc., Employee Benefit Plan, Virginia

Appendix A

Polytechnic Institute and State University Employee Benefit Plan, Campbell Country Transport Employee Benefit Plan, State of Virginia Employee Benefit Plan, Hodgerman's Company Employee Benefit Plan, American General Life & Accident Insurance Co., Administrator and/or Trustee on Behalf of American General Life & Accident Insurance Co. Employee Benefit Plan; Benefit Trust Life, Administrator and/or Trustee on Behalf of Lagrange County Club, Inc. Employee Benefit Plan, Wood Tech, Inc. Employee Benefit Plan; Blue Cross of Alaska; Blue Cross of Washington; Speciality Medical Clinic Employee Benefit Plan, Bell Atlantic Corporation; C & P Telephone; Tuthill Corporation; FKW, Inc.; Blue Cross/Blue Shield of Minnesota; Blue Cross/Blue Shield of Maine; Bankers Life and Casualty Company; National Association of Health Underwriters; City of Lewiston School Department; Reliastar Life Insurance Company; PPG Industries, Inc; Ventura Insurance Administrators, Inc.; Ventura County Foundation For Medical Care, Inc.; A & P Grocery Store, Inc.; A & P Grocery Store, Inc. Employee Benefit Plan; Crawford Insurance Company; Security Benefit Trust Fund, Roofers Local 149 Security Benefit Trust Fund; Roofers Local 149 Employee Benefit Plan; ITT Hartford Group Inc., ITT Hartford Group, Inc., As Administrator and/or Trustee; General American Life Insurance Company; Genelco; Pan-America Life Insurance Company; National Insurance Services; David Koppe; William McGuire M.D.; Metrahealth Care Management Corporation; United Healthcare Corporation; United Healthcare Corporation Employee Benefit Plan; United Healthcare Services , Inc.; United Behavioral Systems, Inc.; Operating Engineers Local 37 Health and Welfare Fund; Cappcare, Inc.; Michael Henry; Health International, Inc.; erroneously served and sued as Health International Corp.; Stanislaus Foundation for Medical Care; Executive Risk; Benefit Panel Services; Great-West Life Assurance Company; Rocky Mountain Medical Services, DBA Blue Cross and Blue

Shield of Colorado; Carpenters Health and Welfare Trust for Southern California; Carpenters Pension Trust for Southern California; Carpenters Southern California Administrative Corporation; Millwrights Local Union No. 1607; Carpenters Local Union No. 1506; Chicago District Council of Carpenters Welfare Fund; Chicago District; Council of Carpenters Pension Fund; Retail Clerks-Employers Benefit Plans of Northern California and Valley Clerks Trust Fund; CT Corporation, CSC The United States Corporation; Blue Cross/Blue Shield of California; Metropolitan Life Insurance Company, Administrators and/or Trustee on Behalf of: Sears, Roebuck & Co. Group Medical Plan, Chemical Bank Inc. Employee Benefit Plan, New York State Freeway Authority Employee Benefit Plan, New York State Department Civic Employee Benefit Division, Tenneco/J.I. Case Co. Employee Benefit Plan, Sun Chemical Corporation Employee Benefit Plan, Dunn & Bradstreet Employee Benefit Plan, Rockwell International, Inc. Employee Benefit Plan, ZEP Manufacturing Company Employee Benefit Plan, National Services Industries, Inc. Employee Benefit Plan, F.W. Woolworth Company Employee Benefit Plan, Nordstrom's Inc. Employee Benefit Plan, Town of New Paltz Employee Benefit Plan, Trustees of the American Engineers Council Insurance Trust Fund, Felker Benefit Services, Pepsico, Inc. Employee Benefit Plan, Ukiah Unified School District Employee Benefit Plan, Louisiana-Pacific, Inc. Employee Benefit Plan, General Electric Company Employee Benefit Plan, Proctor & Gamble Corporation Employee Benefit Plan, City of Culver Employee Benefit Plan, California Conservation Corp. Employee Benefit Plan, Allcare Plan, Transport International Tools, Inc. Employee Benefit Plan, Wood Company Employee Benefit Plan, Montgomery Ward Inc. Employee Benefit Plan, R.H. Macy's, Inc. Employee Benefit Plan, McDonough Capperton, Inc. Employee Benefit Plan, Toys R Us Inc. Employee Benefit Plan, J.I. Case Power & Equipment, Inc. Employee Benefit Plan; MetraHealth, William

W. McGuire, M.D.; David Koppe; Unified Behavioral Systems, Inc.; National Association of Life Unerwriters; Southwestern Bell Employee Benefit Plan; Universal City Studios, Inc., Universal Studios Employee Benefit Plan; Mutual of Omaha; Healthcare Compare Corporation; Health Risk Management, Inc.; Benefit Administrators, Inc.; Care America, Inc.; Uniformed Service Benefit Plan, Inc.; U.S. Postal Service; Yuma Proving Ground; U.S. Army; U.S. Marine Corps; U.S. Navy; U.S. Air Force; U.S. Coast Guard; United States of America; First Health, Inc.; Great West Life Assurance Company; Blue Cross/Blue Shield of Alabama; Service Master, Inc. Employee Benefit Plan; Gary Methodist Hospital, Inc., Gary Methodist Hospital, Inc. Employee Benefit Plan; Lewiston School; Maine Sate Correctional Institution Employee Benefit Plan; Blue Cross/Blue Shield of Oregon, Inc., Administrator and/or Trustee on Behalf of: Safeway Stores, Inc. Employee Benefit Plan, Painters Local 10 Employee Benefit Plan, John Q. Hammonds Hotels, Inc. Employee Benefit Plan; Adventist Health System of Loma Linda, Administrator and/or Trustee on Behalf of Loma Linda School of Medicine Health Assistance and Medical Personnel Services Plan; Loma Linda School of Medicine Health Assistance and Medical Personnel Services Plan; United Chambers Insured Plans; American General Life & Accident Insurance Co., Administrator and/or Trustee on Behalf of American General Life & Accident Insurance Co. Employee Benefit Plan; American Community Mutual Insurance Co.; American Trust Administrators; Automotive Industries Welfare Fund Medical Plan, Brown Group Insurance Co., Administrators and/or Trustee on Behalf of Brown Group Insurance Co. Healthcare Plan; Bankers Life & Casualty Company, Administrator and/or Trustee on Behalf of City of Chicago Employee Benefit Plan; The Vollrath Company, Inc., The Vollrath Company, Inc. Employee Benefit Plan; Chubb Life America; Comparitive Ins. Serv.; McDonnell Douglas Corp/Douglas Aircraft Company; Screen Actors

Guild-Producers Pension Plan; Swim Chem Products, Inc., Great Lakes Chemical, Inc.; BL Network, Inc. Employee Benefit Plan; Group Resources, Inc.; Harcourt Brace Jovanovich, Inc.; Health Economics Corporation; City/County of San Francisoo; Insurnational Insurance Administrators, Inc.; Insurnational, Inc.; Intermountain Administrators, Inc.; Laborers Health & Welfare Trust for Southern California; McDowell Agency, Inc.; Mutual Assurance; San Francisco Print Industry Welfare Fund, and Newspaper & Periodical Driver's & Helper's Union Local 921-Publisher's Welfare Trust; Pavers and Road Builders District Council Welfare Fund; Jack Wickware; IBEW-NECA Southwestern Health and Benefit Fund; Wal-Mart, Inc.; Wal-Mart, Inc. Associates Group Health Plan; State Farm Mutual Automobile Insurance Company; Group Health Incorporated; Federated Mutual Insurance Company; European Care Parts, Inc.; Employee Benefit Plan; F.W. Woolworth Company Employee Benefit Plan; F.W. Woolworth Co.; Paula Assurance Co; Pan American Underwriters, Inc; Gallagher Bassett Services, Inc.; Employee Benefits Administration and Management Corporation; Milk & Ice Cream Employee Welfare Plan; Blue Cross Blue Shield of Delaware; Blue Cross Blue Shield of Indiana; Blue Cross Blue Shield of Kentucky; Blue Cross Blue Shield of New Jersey; Blue Cross Blue Shield of Connecticut; United Insurance Company of America; NALC Health Benefit Plan; Indiana Child Protective Services; Northern Indiana State Developmental Center; Columbia HCA Healthcare Corporation; Defendants-Appellants. No. 98-55905

Submitted Feb. 11, 2000 [FN 1]

FN1. The panel unanimously finds this case suitable for decision without oral argument. See Fed.R.App.P. 34(a)(2).

Filed March 17, 2000

Appendix A

Assignee, to whom employee health plan beneficiaries' claims were reassigned by health care providers, commenced action against health plans and health insurance industry defendants, alleging Employee Retirement Income Security Act (ERISA), antitrust, and Racketeer Influenced and Corrupt Organizations Act (RICO) violations. The United States District Court for the Central District of California, Gary L. Taylor, J., 955 F. Supp. 93, dismissed complaint for failure to state a claim. Plaintiff appealed. The Court of Appeals, Wiggins, Circuit Judge, held that: (1) plaintiff lacked derivative standing to bring ERISA enforcement action; (2) plaintiff failed to allege direct injury from alleged antitrust violation; (3) plaintiff failed to allege direct injury or enterprise as required for his RICO claims; and (4) district court properly denied plaintiff leave to amend.

Affirmed.

West Headnotes

[1] Federal Courts ⇨776
170BK776
Court of Appeals reviews de novo district court's dismissal of claims for failure to state claim. Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

[2] Federal Courts ⇨776
170BK776

District Court's interpretation of Employee Retirement Income Security Act (ERISA) was a question of law that Court of Appeals reviewed de novo. Employee Retirement Income Security Act of 1974. § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[3] Pensions ⇨139
296k139

Assignee of employee health plan beneficiaries' benefit claims lacked derivative standing to bring Employee Income Retirement Security
Act (ERISA) enforcement action, event though claims were assigned to him by health care providers that would have had derivative standing; granting derivative standing to health care providers furthered purposes of ERISA by simplifying billing structure as between provider, patient, and benefit plan, while granting derivative standing to third parties with no relationship to beneficiary would be tantamount to transforming health benefit claims into tradable commodities and would not further any ERISA purpose. Employee Retirement Income Security Act of 1974, § 502(a)(1)(B), 29 U.S.C.A. § 1132(a)(1)(B).

[4] Monopolies ⇨28(1.4)
265k23(1.4)

In order to give rise to a private cause of action, an antitrust violation must be the proximate cause of the plaintiff's injury. Clayton Act, § 4(a), 15 U.S.C.A. § 15(a).

[5] Monopolies ⇨28(1.4)
265k28(1.4)
[6] Monopolies⇨28(1.6)
265k28(1.6)

When determining whether a plaintiff's injuries suffice to provide standing for a private antitrust action, courts examine three factors: (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning

damages to obviate the risk of multiple recoveries. Clayton Act, § 4(a), 15 U.S.C.A. § 15(a).

[7] Racketeer Influenced and Corrupt Organizations ⇨58
319Hk58

In order to bring a private action under Racketeer Influenced and Corrupt Organizations Act (RICO) section prohibiting investment or improper use of money obtained from racketeering activity, plaintiff must allege that he suffered injury arising from defendant's investment or improper use of racketeering income. 18 U.S.C.A. § 1962(a).

[8] Racketeer Influenced and Corrupt Organizations⇨62
319Hk62

Assignee, to whom patients' claims against employee healthplans were reassigned by health care providers, was not directly injured, as required for assignee's Racketeer Influenced and Corrupt Organization Act (RICO) claim, by plans' alleged fraudulent denial of health benefits and subsequent investment of proceeds in group of preferred medical providers in order to exclude outside providers. 18 U.S.C.A. § 1962(a).

[9] Racketeer Influenced and Corrupt Organizations⇨38
319Hk38

A group does not constitute an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act (RICO) unless it exists independently from the racketeering activity in which it engages; at minimum, a RICO enterprise must have some sort of structure for the making of decisions and some mechanisms for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis. 18 U.S.C.A. §§ 1961(4), 1962(c).

[10] Racketeer Influenced and Corrupt Organizations⇨35
319Hk35
A group whose members collectively engage in an illegal act does not, in-and-of-itself, constitute an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1962(c).

[11] Racketeer Influenced and Corrupt Organizations Act (RICO)⇨39
319Hk39

Employee health plans and health insurance companies that allegedly collaborated in scheme to defraud plan beneficiaries did not constitute enterprise required for private Racketeer Influenced and Corrupt Organizations Act (RICO) action, where there was nothing that showed structure to alleged collusion beyond racketeering activity itself. 18 U.S.C.A. § 1962(c).

[12] Conspiracy
91k9

Plaintiff's failure to state claims under Racketeer Influenced and Corrupt Organization Act (RICO) provisions prohibiting investment of racketeering income and conducting affairs of RICO enterprise precluded his pleading claim for conspiracy to violate either of those provisions. 18 U.S.C.A. § 1962(a,c,d).

[13] Federal Courts ⇨817
170Bk817
The Court of Appeals reviews for abuse of discretion a district court's denial of further leave to amend, and the court's discretion is particularly broad when the plaintiff previously has been granted leave to amend.

Appendix A

[14] Federal Civil Procedure ⇨1838
170Ak1838

Key question in determining whether district court properly denied plaintiff further leave to amend after dismissal is whether plaintiff could have saved his complaint through further amendment.

[15] Federal Civil Procedure ⇨ 1838
170Ak1838

District court properly denied plaintiff leave to amend his antitrust and Racketeer Influenced and Corrupt Organizations Act (RIC0) complaint after dismissal, even though it was theoretically possible for him to allege more specific facts; both claims failed due to absence of direct injury, and fact that court had already given plaintiff three opportunities to amend claims suggested futility of further amendment.
*1078 Stephen Simon, in Propria Persona, Inverness, Florida, for the plaintiff-appellant.

Bruce A. Beckman, Jeffrey P. Smith, Brian F. Rowe, Beckman, Davis, Smith & Ruddy, Los Angeles, California, for defendants-appellees Value Behavioral Health, Inc., Value Health, Inc., Preferred HealthCare Ltd., American Psychmanagement, Inc., Robert Patricelli, The Prudential Insurance Company of America, The Guardian Life Insurance Company of America, Pacific Mutual Life Insurance Company, PM Group Life Insurance Company, Blue Cross/Blue Shield of Ohio, Mutual Health Service Co., McDonough Capperton, Inc. Employee Benefit Plan and Health Management Strategies International, Inc.

Robert S. Hark, Hark & Andrucki, Lewiston, Maine, and

Jeffrey A. Modisett, Attorney General of Indiana, Indianapolis, Indiana, for defendants-appellees City of Lewiston and Maine.

Dennett F. Kouri, William E. von Behren, Brian K. Mazen, Mezerve, Mumper & Hughes, Los Angeles, California, for defendants-appellees American General Life and Accident Insurance Company, et al.

James M. Harris and Amy L. Applebaum, Sidley & Austin, Los Angeles, California, for defendants-appellees CT Corporation and CSC The United States Corporation.

Michael R. Feinberg, Schwartz, Steinsapir, Dohrmann & Sommers, Los Angeles, California, for defendants-appellees NALC Health Benefit Plan.

Mark Hanley Lipton, Granite Bay, California, for defendants-appellees Comparative Insurance Services.

Louise H. Renne, City Attorney; Patrick J. Mahoney, Chief Trial Deputy; Peter Obstler, Deputy City Attorney, San Francisco, California, for defendants-appellees City and County of San Francisco.

Thomas A. Miller and Michael S. Henderson, Robins, Kaplan, Miller & Ciresi, Costa Mesa, California, for defendants-appellees Blue Cross and Blue Shield of Minnesota, Federated Mutual Insurance Company and European Car Parts, Inc. Employee Benefit Plan.

Ronald J. Cooke and Nanette B. Zamost, Littler Mendelson, Los Angeles, California for defendants-appellees Harcourt Brace Jovanovich, Inc.

Delbert C. Gee, Sturgeon, Keller, Phillips, Gee & O'Leary, San

Francisco, California, for defendants-appellees Blue Cross & Blue Shield of Georgia, Blue Shield & Blue Cross of Maryland, Blue Shield & Blue Cross of North Dakota, Blue Shield & Blue Cross of Nebraska, and Blue Shield of California.
*1079 William M. Demlong and J. Gregory Cahill, Bess Kunz, Phoenix, Arizona, for defendants-appellees American Community National Insurance Company Employee Benefit Plan(s).

Neil J. Barker, Pasadena, California, for defendants-appellees Blue Cross and Blue Shield of Alabama.

Marc J. Wodin, Law Offices of Marc J. Woodin, Woodland Hills, California, for defendants-appellees Bankers Life and Casualty Company.

Christopher W. Tompkins, Betts, Patterson & Mines, Seattle, Washington, for defendants-appellees Swim Chem Products, Inc.; Great Lakes Chemical Corporation, BL Network, Inc. and BL Network, Inc. Employee Benefit Plan.

Alexander B. Cvitan and Esteban Lizardo, Reich, Adell, Crost & Cvitan, Los Angeles, California, for defendants-appellees Laborers Health and Welfare Trust Fund for Southern California.

Gregory H. Halliday and Deborah L. O'Connor, Sedgwick, Detert, Moran & Arnold, Irvine, California, for defendants-appellees Healthcare Compare Corp. (formerly known as HealthCare COMPARE Corp. d/b/a AFFORDABLE Medical Networks and Affordable Health Care Concepts, k/n/a First Health Group Corp.)

Sean P. Nalty and Karleen F. Murphy, Kelly, Herlihy, Advani & Klein, San Francisco, California, for defendants-appellees

United Insurance Company of America.

Robert S. Schulman and James C. Martin, Crosby, Heafey, Roach & May, Los Angeles, California, for defendants-appellees Gallagher Bassett Services, Inc.

Leon W. Weidman, Assistant United States Attorney, and Jon Pearson, Assistant United States Attorney, Los Angeles, California, for defendants-appellees United States Post Office: United States Postal Service Employee Benefit Plan; Civilian Health and Medical Programs of the Uniformed Services; United States Office of Personnel Management; United States Army; United States Army Employee Benefit Plan; United States Academy of Health Science; United States Marine Corps; United States Marine Corps Employee Benefit Plan; United States Navy; United States Navy Employee Benefit Plan; United States Air Force; United States Air Force Employee Benefit Plan; Environmental Protection Agency; Environmental Protection Agency Employee Benefit Plan; United States Forest Service; United States Forest Service Employee Benefit Plan; Federal Aviation Administration; Federal Aviation Administration Employee Benefit Plan; Veteran's Administration; Veteran's Administration Employee Benefit Plan.

Daniel W. Maguire and Ann C. Schneider, Galton & Helm, Los Angeles, California, for defendants-appellees ITT Hartford Group, Inc. and ITT Hartford Group, Inc., As Administrator and/or Trustee; General American Life Insurance Company; Genelco; Pan-American Life Insurance Company; National Insurance Services, David Koppe, William McGuire, MD; Metrahealth Care Management Corporation' United Healthcare Corporation; United HealthCare Corporation Employee Benefit Plan; United Healthcare Services, Inc.; United Behavioral Systems, Inc.; Tricon Global Restaurants

Inc.; Pepsi Co.; and Taco Bell.

Meghan K. Serwin and Michael Annis, Paula Financial, Pasadena, California, for defendants-appellees Paula Fianancial.

Margaret H. Campbell and Andrea L. Bailey, Ogletree, Deakins, Nash, Smoak & Stewart, Atlanta, Georgia, for defendants-appellees Group Resources, Inc.

Mary Hulett and Scott A. Brooks, Daniels, Baratta & Fine, Los Angeles, California, for defendants-appellees National Association of Health Underwriters,

Roland C. Bainer, Clayson, Mann, Yaeger & Hansen, Corona, California, for defendants-appellees Adventist Health System of Loma Linda; Loma Linda University; Loma Linda University Medical Center; Loma Linda University of Medical Group Inc.; Adventist Health * 1080 System of Loma Linda Employee Benefit Plan; Loma Linda University School of Medicine Health Assistance and Medical Personnel Service Plan; Loma Linda University Medical Center Employees Benefit Plan; and Loma Linda University Medical Group, Inc. Employee Benefit Plan.

Ellen Kamon, Rosato & Samuels, North Hollywood, California, for defendants-appellees Metropolitan Life Insurance Company and Jack Wickware.

Appeal from the United States District Court for the Central District of California; Gary L. Taylor, District Judge, Presiding. D.C. No. CV -96-00711-GLT.

Before: D.W. NELSON, WIGGINS, [FN2] and RYMER, Circuit Judges.

FN2. Judge Wiggins authored this Opinion prior to his death.

WIGGINS, Circuit Judge:

Appellant Stephen Simon appeals for the district court's dismissal of his civil suit against approximately 1,600 defendants in the health insurance industry. We have jurisdiction under 28 U.S.C. § 1291, and we AFFIRM.

I.

When filing this appeal, Simon requested initial en banc hearing pursuant to Rule 35 of the Federal Rules of Appellate Procedure. The judges of this circuit were notified of this request, but no judge called for an en banc vote. Simon's request is therefore denied. See Fed. R. App. P. 35(f).

II.

Over 600 mental health care patients assigned their benefit claims to at least six mental health care providers who later reassigned these claims to Simon. In June 1996, Simon filed suit to recover on these claims from approximately 1,600 defenants (collectively "Appellees") consisting primarily of insurance companies, insurance company agents, insurance industry trade groups, employee benefit plans, employers, and governmental entities. His complaint alleged, inter alia, that Appellees violated (1) the Employee Retirement Income Security Act ("ERISA"), codified at 29 U.S.C. § 1001 et seq.; (2) Section 1 of the Sherman Antitrust Act, codified at 15 U.S.C. § 1001; (3) the Clayton Act, codified at 15 U.S.C. §§ 12-27 and 29 U.S.C. §§ 52-53; and (4) the Racketeer Influenced and Corrupt Organizations Act ("RICO"), codified at 18 U.S.C. §§ 1961-1968.

Reduced to their core, these claims accuse Appellees of engaging in a mass conspiracy to withhold benefits fraudulently and to restrain trade.

[1] The district court dismissed all of Simon's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. We review do novo the district court's dismissal of these claims. See Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998).

III.

[2] The first issue on appeal is whether Simon has standing under ERISA, as the assignee of other assignees, to sue on the 600-plus benefit claims that were assigned to him. In a published order, the district court held that Simon lacked standing because he was neither a participant nor a beneficiary of a health benefit plan within the meaning of ERISA and because he was ineligible for the derivative standing that health care providers enjoy. See Simon vs. Value Behavioral Health, Inc. 955 F. Supp. 93, 95-96 (C.D. Cal. 1997). The district court's interpretation of ERISA raises a question of law which we review de novo. See Arnold v. Arrow Transp. Co. of Del., 926 F.2d 782, 785 (9th Cir. 1991). We affirm the district court's decision that Simon lacked standing.

Section 502(a)(1)(B) of ERISA authorizes health benefit plan participants and beneficiaries to bring civil enforcement actions to recover plan benefits. [FN3] See 29 *1081 U.S.C. § 1132 (a)(1)(B). The Supreme Court has construed Section 502 narrowly to permit only the parties enumerated therein to sue directly for relief. See Franchise Tax Bd. V. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 27, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); see also Cripps v. Life Ins. Co. of N. Am., 980 F.2d. 1261, 1264-65 (9th Cir. 1992)(following

Franchise Tax Bd. To deny insurance companies standing to sue under Section 502). Simon conceded in district court that he is neither a participant nor a beneficiary of any of the plans under which his benefit claims arise. Consequently, because he is not one of the parties enumerated in Section 502(a)(1)(B), he may not sue directly under ERISA.

> FN3. Section 502(a)(1)(B) also authorizes plan fiduciaries and the Secretary of Labor to file suit. See 29 U.S.C. § 1132(a)(1)(B). These provisions, however, do not apply to the instant case because Simon has never alleged himself to be a plan fiduciary and because he obviously is not the Secretary of Labor.

[3] Simon also lacks standing under derivative standing theory. In Misic v. Building Serv. Employees Health & Welfare Trust, 789 F.2d 1374 (9th Cir. 1985)(per curiam), we created a judicial exception to the rule that only enumerated parties may sue for benefits under Section 502(a)(1)(B). In Misic, we granted derivative standing to health care providers to whom beneficiaries had assigned their benefit claims after receiving medical care from such providers. See Misic, 789 F.2d. At 1376-79. From the record, however, it is clear that Simon' s complaint alleged no facts suggesting that he provided medical care to any of the beneficiaries of the benefit claims he holds. In fact, his complaint expressly alleged that he acquired these claims through financial transactions with the health care providers to whom the beneficiaries originally assigned their claims. Because it is clear from the face of the complaint that Simon is not a health care provider to whom a beneficiary has assigned his claim in exchange for health care, he is ineligible for derivative standing under Misic.

Simon asks us to extend Misic to cover not only health care providers but also the assignee of health care providers. We

decline. In upholding the assignment of benefit claims to health care providers in Misic, we observed that such assignment would facilitate the receipt of health care benefits by beneficiaries because, among other things, it would (1) make "it unnecessary for health care providers to evaluate the solvency of patients before commencing medical treatment" and (2) save beneficiaries from the burden of fronting potentially large medical bills while waiting for reimbursement from their health benefit plans. Misic, 789 F.2d at 1377. In other words, we granted derivative standing to health care providers not because we believed that federal common law on derivative standing trumps the plain language of Section 502. We granted it because permitting health care providers to sue in place of the beneficiaries they had treated was consistent with Congressional intent in enacting ERISA. See id.; see also Hermann Hosp. v. MEBA Med. & Benefits Plan, 845 F.2d. 1286, 1289 n. 13 (5th Cir. 1988)("To deny standing to health care providers as assignees of beneficiaries of ERISA plans might undermine Congress' goal of enhancing employees' health and welfare benefit coverage."). Granting derivative standing to health care providers simplified the billing structure among the patient, his care provider, and his benefit plan in a way that enhanced employee health benefit coverage.

In the instant case, for us to grant Simon standing would be tantamount to transforming health benefit claims into a freely tradable commodity. It could lead to endless reassignment of claims, and it would allow third parties with no relationship to the beneficiary to acquire claims solely for the purpose of litigating them. We do not see how such a result would further ERISA's purpose. Our review of the statutory text of Section 502, relevant precedent, and the legislative history of ERISA also revealed no indication that Congress intended for plaintiffs in Simon's ***1082** position to sue under ERISA. We therefore decline to extend derivative standing to Simon. Cf.

Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 14 (2d Cir. 1991)("[I]n the absence of some indication of legislative intent to grant additional parties standing to sue, the list in § 502 should be viewed as exclusive."). Because Simon lacks standing, the district court properly dismissed his ERISA claims.

IV.

Simon's antitrust claims essentially accuse Appellees of engaging in two practices: (1) operating two-tiered health plans in which patients who use network providers enjoy better benefits than those who use out-of-network providers; and (2) sharing statistical information about the usual and customary charges for medical treatment. The gravamen of these claims is that these practices constitute a restraint of trade but that drove certain out-of-network providers out of business. The district court dismissed Simon's antitrust claims on the basis of the McCarran-Ferguson Act, codified at 15 U.S.C. § 1012(b), which exempts the business of insurance from federal antitrust regulation. We affirm for a simpler reason: Simon lacks standing to assert his antitrust claims. See Steckman, 143 F.3d at 1295 (permitting affirmance of a Rule 12(b)(6) dismissal on any proper ground regardless of whether the district court relied on that ground).

[4][5] Federal antitrust laws provide a private right of action only to individuals who are "injured in [their] business or property by reason of" a federal antitrust violation. 15 U.S.C. § 15(a). The violation must be the proximate cause of the injury. See Blue Shield of Virginia v. McCready, 457 U.S. 465, 477, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982); Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc., 185 F.3d 957, 963 (9th Cir. 1999), cert. denied, —U.S.—, 120 S.Ct. 789, 145 L.Ed.2d 666 (2000). When determining whether a

plaintiff's injuries suffice to grant him standing to sue, we examine three factors: "(1) whether there are more direct victims of the alleged wrongful conduct who can be continued on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries." Oregon Trust Fund, 185 F.3d at 963.

[6] In the instant case, there are more direct victims of Appellees' allegedly illegal conduct. To the extent that Appellees' practices drove certain health care providers out of business, it was the providers who suffered the injury. To the extent that Appellees' practices restricted a plan beneficiary's access to mental health care, it was the beneficiary who suffered the injury. Simon's connection to the alleged victims is at best one-step removed: He is merely the assignee of benefit claims. He is neither an injured beneficiary nor an injured health care provider, and thus the first factor weighs heavily against him.

The second and third factors also do not favor Simon. Because Simon never alleged how he himself has been injured by Appellees' actions, it is impossible to ascertain how much of such injury is attributable to Appellees' conduct or whether the apportionment of damages will require complex rules. Even if we were to assume that Simon was injured by the loss of whatever consideration he paid in exchange for the assignment of the benefit claims, we still would face the difficult task of determining how much of the antitrust injury to the health care providers should be imputed onto the beneficiaries and then further imputed onto Simon. After this task is done, we then would face the even more difficult task of apportioning damages. Although it is unclear whether this case implicates

a risk of multiple recovery, apportioning damages would be complicated by virtue of the complexity of Appellees' interactions.

*1083 In sum, no factor supports Simon, and the first factor in particular weighs heavily against him. We therefore find that Simon lacks standing to assert his antitrust claims and affirm their dismissal by the district court. See id. at 963-966 (denying standing to a plaintiff who did not suffer a direct injury from the defendant's conduct).

V.

The last set of substantive issues concerns Simon's RICO claims. In his complaints, Simon alleged that Appellees engaged in a pattern of racketeering activity in violation of 18 U.S.C. §§ 1962(a), 1962(c) & 9162(d). But because his complaint failed to alleged either an injury caused by the investment of racketeering income or the existence of a RICO enterprise, we affirm the dismissal of his RICO claims.

(A) 18 U.S.C. § 1962(a)

[7] Section 1962(a) prohibits the investment of improper use of money obtained from racketeering activity. See 18 U.S.C. § 1962(a). In order to plead a Section 1962(a) claim, Simon must allege that he suffered injury arising from Appellees' investment or improper use of racketeering income. See Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429 (9th Cir. 1992).

[8] Simon's complaint alleged that Appellees fraudulently denied health benefit claims and then invested the proceeds to develop a group of preferred medical providers who operated to eliminate outside providers. Assuming arguendo that this

conduct constitutes an illegal investment of racketeering income, Simon still has not alleged any injury to himself. Any injury caused by the investment was to the outside medical providers who were allegedly driven out of business by the preferred providers. Nowhere did Simon allege that Appellees' investment drove him out of business or harmed him directly in some way. His failure to plead this requisite element means that he has failed to plead a cognizable Section 1962(a) claim. See Oregon Trust Fund, 185 F.3d at 964 (stating that a "direct relationship between the standing in a private RICO claim).

(B) 18 U.S.C. § 1962(c)

[9][10] Section 1962(c) prohibits association with an "enterprise" engaged in racketeering activity. See 18 U.S.C. § 1962(c). In order to plead a Section 1962(c) violation, Simon must allege that Appellees were associated with an "enterprise" within the meaning of RICO. See Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1117 (9th Cir. 1999). The definition of "enterprise" encompasses both groups with a formal legal structure and those whose members merely associate in fact. See 18 U.S.C. § 1961(4). Either way, however, a group does not constitute an enterprise unless it exists independently from the racketeering activity in which it engages. See Chang v. Chen, 80 F.3d 1293, 1298 (9th Cir. 1996)(citing United States v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)). At minimum, it must have "some sort of structure...for the making of decisions" and "some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc basis." Id. at 1299 (internal quotations omitted). A group whose members collectively engage in an illegal act, in-and-of-itself, does not constitute an "enterprise" for the purposes of RICO. See id. at 1300.

[11] Simon's complaint alleged no more than that Appellees collaborated to defraud health plan beneficiaries. But a "conspiracy is not an enterprise for the purposes of RICO." Chang, 80 F.3d at 1300. As in Chang, Simon did not allege facts that showed a structure to Appellees' collusion beyond the racketeering activity itself. See id. He never alleged the existence of a system of authority that guided the operation of the enterprise. He never alleged that Appellees "utilized a structure separate and apart from the predicate acts to distribute the proceeds of the [allegedly ***1084** fraudulent] transactions." Id. Given the absence of any alleged facts suggesting the existence of an enterprise, he has failed to state a cognizable Section 1962(c) claim. See id. at 1301.

(C) 18 U.S.C. § 1962(d)

[12] Section 1962(d) prohibits the act of conspiring to violate. Section 1962(a) or Section 1962(c). See 18 U.S.C. § 1962(d). Simon's failure to plead the requisite elements of either a Section 1962(a) or a Section 1962(c) violation implicitly means that he cannot plead a conspiracy to violate either section. See Religious Tech. Ctr. v. Wollersheim, 971 F.2d. 364, 367 n. 8 (9th Cir. 1992); see also Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1127 (9th Cir. 1997)("[I]f the section 1962(c) claim does not state an action upon which relief could ever be granted...then the section 1962(d) claim cannot be entertained."). We thus affirm the dismissal of this Section 1962(d) claims.

VI.

[13][14] In dismissing Simon's Third Amended Complaint, the district court denied him further leave to amend his antitrust and RICO claims. Simon argues that this denial constitutes error. We review for abuse of discretion the district court's

denial of further leave to amend. See Griggs v. Pace Amer. Group, Inc. 170 F.3d 877,870 (9th Cir. 1999). The district court's discretion "is particularly broad" when the plaintiff previously has been granted leave to amend. Id. The key question is whether Simon could have saved his complaint through further amendment. See id. We conclude that he could not.

[15] As discussed above, Simon's antitrust claims suffer from a fatal defect: The absence of direct injury. His RICO claims suffered from the same defect and from the absence of a racketeering enterprise. Although it is theoretically possible for Simon to allege more specific facts, his failure to do so after the district court had given him three opportunities to amend his original complaint and had discussed with him the substantive problems with his claims suggests the futility of further amendment. We therefore find no abuse of discretion in the district court's refusal to grant Simon to leave to amend his Third Amended Complaint. See Siseton-Wahpeton Sioux Tribe v. United States, 90 F.3d 351, 356 (9th Cir. 1996)(affirming denial of leave to amend when further amendment would have been futile and when the plaintiff had already been given prior opportunities to amend).

Simon also appeals the district court's denial of leave to amend the ERISA claims in his First Amended Complaint. We again affirm. As discussed above, Simon is neither a plan participant, a plan beneficiary, a health care provider, a plan fiduciary, nor the Secretary of Labor-the only people that the Ninth Circuit has recognized as having standing to sue for benefits under ERISA. Further amendment will not change the fact that he is not one of these five types of people.

VII.

Finally, Simon challenges a number of procedural rulings that

the district court made over the course of the litigation. [FN4] We decline to evaluate the merits of these rulings because any error by the district *1085 court would have been harmless. Even if Simon were entitled to more time to serve process upon Appellees, to join additional defendants to his lawsuit, or to have discovery proceed immediately, he still bore the burden of pleading a cognizable claim. Given that the claims in his complaint were substantively inadequate, they still would not have survived dismissal under Rule 12(b)(6) even if the district court had ruled in his favor on any of the procedural rulings he now challenges.

> FN4. The district court rulings contested by Simon include: (1) allowing Simon only 90 days to serve his First Amended Complaint; (2) refusing to grant Simon additional time beyond those 90 days to serve his First Amended Complaint; (3) dismissing all unserved defendants; (4) ordering Simon to revive the corporate status of two corporations who had assigned benefit claims to him; (5) staying discovery; (6) quashing the service of numerous administrators and trustees of various ERISA employee benefit plans; (7) refusing to grant Simon additional time to serve his Second Amended Complaint; (8) dismissing sua sponte and without prejudice all named defendants except Value Behavioral Health; and (9) denying Simon leave to join additional parties to his Third Amended Complaint.

AFFIRMED.

Appendix B

955 F.Supp. 93
97 Daily Journal D.A.R.
(Cite as: 955 F.Supp. 93)

United States District Court,
C.D. California,

STEPHEN SIMON, Plaintiff,
v.
VALUE BEHAVIORAL HEALTH INC., et al.,
Defendants.

No. SA CV 96-711 GLT [CC]

March 5, 1997.

Third party, holding assigned claims from six health care providers and over 600 individual participants or beneficiaries, sued over 1,600 defendants to recover Employee Retirement Income Security Act (ERISA) benefits allegedly due. Defendants moved to dismiss. The District Court, Taylor, J., held that third party, who was not health care provider, lacked standing to sue on assigned claim for ERISA benefits.

Motions granted.

West Headnotes

Pensions ⇨139
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Third party, who was not health care provider, lacked standing to sue on assigned claim for ERISA benefits payment. Employee Retirement Income Security Act of 1974, § 502(a), 29 U.S.C.A. § 1132(a).

*94 Stephen Simon, Jupiter, FL, pro per.

Audrey Lyness, Barger & Wolen, Los Angeles, CA, Bruce Beckman, Jeffrey Smith, Beckman, Davis, Smith & Ruddy, L.L.P., Los Angeles, CA, Geoffrey Glass, Robins, Kaplan, Miller & Ciresi, Costa Mesa, CA, Guy O. Kornblum, Jeffrey J. Fowler, Bailey & Kornblum, San Francisco, CA, James P. Collins, Jr., Cotkin & Collins, Santa Ana, CA, Dale F. Kinsella, Jack G. Cairl, Jr., Alan R. Kossoff, Kinsella, Boesch, Fujikawa & Towle, Los Angeles, CA, Gregory H. Halliday, Michael J. Khouri, Deborah L. O'Connor , Sedgwick, Detert, Moran & Arnold, Irvine, CA, Erica S. Arouesty, Stephen L. Hewitt, Hewitt & Prout, North Hollywood, CA, Dennett F. Kouri, Sr., Geoffrey Tong, Meserve, Mumper & Hughes, Los Angeles, CA, Kirk A. Patrick, Gibson, Dunn & Crutcher, Los Angeles, CA, Ellen Kamon, Rosato & Samuels, North Hollywood, CA, Daniel W. Maguire, Mark Riekhof, Galton & Helm, Los Angeles, CA, Gordon E. Krischer, Kenneth E. Johnson, O'Melveny & Myers, L.L.P., Los Angeles, CA, Kenneth L. Schmetter, Senior Supervising Attorney, City of Chicago, Department of Law, Chicago, IL, Patrick J. Mahoney, Chief Trial Attorney, Margaret W. Baumgartner, Deputy City Attorney, San Francisco, CA Marta M. Fernandez, Rebecca L. Torrey, Lynne M. Hook, Jeffer, Mangels, Butler, & Marmaro, Los Angeles, CA Jeffrey L. Sikkema, Juan C. Basombrio, Dorsey & Whitney, L.L.P., Costa Mesa, CA, Ronald J. Cooke, Meghan A. White, Littler, Mendelson, Fastiff, Tichy & Mathiason, Los Angeles, CA, Mark A. Wooster, Universal City, CA, J. Thomas Bowen, Davis Cowell & Bowe, San Francisco, CA, Roland C. Bainer, Clayson, Mann & Yaeger, Corona, CA, Marc J. Woodin, Law Offices of Marc J. Wodin, Woodland Hills, CA, J. Mark Waxman, Jonathon E. Cohn, Foley, Lardner, Weissburg & Aronson, Los Angeles, CA, Patrick T. Connor, DeCarlo, Connor & Selvo, Los Angeles, CA, Michael R. Feinberg, Los Angeles, CA, David C. Capell, J. Matthew Patton, Gordon &

Rees, L.L.P., San Francisco, CA Ronald J. Hein, Jr. Terrence T. Creamer, Chicago, IL, Sean P. Nalty, Wyne A. Aher, Kelly & Herlihy, San Francisco, CA, Keith M. Parker, Rachelle Singer, Irvine, CA, Stephen M. Harris, Diron M. Ohanian, Knapp, Petersen & Clarke, Glendale, CA, Elizabeth W. Walker, Paul, Hastings, Janofsky & Walker, Los Angeles, CA, Alexander B. Cvitan, Esteban Lizardo, Darren Goodman, Reich, Adell, Crost & Cvitan, Los Angeles, CA, Ted L. Wilkes, New York City, Robert J. Stumpf, Jr. Lyn A. Bersch, Bronson & Bronson & McKinnon, L.L.P., San Francisco, CA, Stephanie L. Chilton, Hermosa Beach, CA, Robert L. Dysart, Bess & Dysart, Phoenix, AZ, W. Mark Wood, Phillip R. Kaplan, Todd A. Green, O'Melveny & Myers, L.L.P. Newport Beach, CA, Margaret H. Campbell, Andrea L. Bailey, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Atlanta, GA, John Provost, Beeson, Tayer & Bodine, Sacramento, CA, Lesley C. Green, Los Angeles, CA, Diane C. Blasdel, Selzer, Ealy, Hemphill & Blasdel, Rancho Mirage, CA, Scott A. Brooks, Daniels, Baratta & Fine, Los Angeles, CA, Robert S. Schulman, Linda Margolies Salem, Crosby, Heafey, Roach & May, Los Angeles, CA, Meghan K. Serwin, Paula Financial Inc., Pasadena, CA., Paul Alexander, Vanessa Wells, Palo Alto, CA, Richard J. Foster, Paone, Callahan, McHOlm & Winton, Irvine, CA, Peter E. Romo, Jr. Horace W. Green, Seyfarth, Shaw, Fairweather & Gerald, San Francisco, CA, Phillip M. Miller, Saltzman & Johnson Law Corp., San Francisco, CA, Mark Lipton, Lipton, Warnlof & Segal, Walnut Creek, CA, Jacob J. Stettin, Stettin, & Cass, Los Angeles, CA, Robert S. Hark, Lewiston, ME, Patrick M. Smith, Nugent & Newnham, A.P.C., San Diego, CA, Ronald K. Alberts, Jeffrey A. Katz, Frye, Alberts & Malchow, Los Angeles, CA, Neil J. Barker, Gronemeier & Barker, Pasadena, CA, Marc A. Becker, Munger, Tolles & Olson, L.L.P., Los Angeles, CA, David T. DiBiase, Regina R. Wong, Los Angeles, CA Jana I. Lubert, Lewis, D'Amato, Brisbois & Bisgaard, Los Angeles, CA Marc Epstein, Gaims, Weil, *95 West & Epstein,

L.L.P., Los Angeles, CA, Judith A. Ripps, Harnett Lesnick & Ripps, P.A., Boca Raton, FL, Douglas A. Kuber, Quinn, Emanuel Urquhart & Oliver, L.L.P., Los Angeles, CA, Scott D. Norton, Sullivan, Ward, Bone, Tyler & Asher, P.C., Southfield, MI, Owen Strange, Booth, Michael & Strange, L.L.P., Los Angeles, CA, for Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

TAYLOR, District Judge.

The Court holds a third party who is not a health care provider lacks standing to sue on an assigned claim for ERISA benefits payment.

Plaintiff sues over 1,600 defendants to recover ERISA benefits allegedly due. Although not a health care provider, Plaintiff holds assigned claims from six health care providers and over 600 individual participants or beneficiaries. [FN1]

> FN1. Plaintiff was not assigned these claims from the individuals themselves. Apparently, he received these assignments from six health care providers who had the claims assigned to them by the individuals. Thus, Plaintiff is the assignee of an assignee.

Under the Employees Retirement Income Security Act of 1974 (ERISA), plan participants or beneficiaries are permitted to bring civil enforcement actions to recover plan benefits. 29 U.S.C. § 1132(a)(1)(B). A "participant" is defined as "any employee..." who is or may become eligible to receive a benefit of any type from an employee benefit plan..." 29 U.S.C. § 1002(7). A "beneficiary" is defined as a "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29

Appendix B

U.S.C. § 1002(8).

ERISA creates "six carefully integrated civil enforcement provisions" which identify who may pursue a claim under the statute. Massachusetts Mutual Life Inc. Co. v. Russell, 473 U.S. 134, 146, 1095 S.Ct. 3085, 3092, 87 L.Ed.2d 96 (1985). The Ninth Circuit has held ERISA does not forbid a beneficiary from assigning a right of reimbursement under a medical plan to his health care provider. Misic v. Building Services Employees Health and Welfare Trust, 789 F.2d. 1374, 1377 (9th Cir. 1986). But, Plaintiff fails to present persuasive authority supporting standing of a third party ERISA claim assignee other than the beneficiary's health care provider.

> FN2. In Misic, the court concluded that ERISA did not forbid a health care provider assignment because "the general goal of the statute would [not] be served by prohibiting the type of assignments involved in this case." 789 F.2d at 1377. Unlike in Misic, Plaintiff here does not have the same personal interest in dealing directly with the trust fund as does a health care provider.

Other courts have permitted standing based on assignments of ERISA claims to health care providers. Se Lutheran Medical Center v. Contractors, Laborers, Teamsters, and Engineers Health and Welfare Plan, 25 F.3d 616, 620 (8th Cir. 1994); Hermann Hospital v. MEBA Medical & Benefits Plan, 845 F.2d 1286, 1290 (5th Cir. 1988); Protocare of Metropolitan N.Y., Inc. v. Mutual Ass'n Administrators, Inc., 866 F.Supp. 757, 762 (S.D.N.Y. 1994); Care Unit Hospital v. Travelers Companies, 787 F.Supp 750, 753 (S.D. Ohio 1991); Belmont Community Hospital v. Local Union No. 9, 737 F.Supp. 1034, 1037 (N.D. Ill. 1990). But see Northeast Dept. ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d

147, 14 n. 6 (3d Cir. 1985)(expressing "serious doubts" over whether assignment of ERISA claims was valid under 29 U.S.C. § 1132(a)(1)(B)). However, apparently no court has recognized an assignment to a third party who is not a health care provider.

Without further authority from the Ninth Circuit, this Court will not "tamper with an enforcement scheme crafted with such evident care," Massachusetts Mutual, 473 U.S. at 147, 105 S.Ct. at 3093, and recognize the standing of a third party not specifically authorized by Congress in section 1132(a). The Ninth Circuit and other circuits have expanded that class to health care providers, but this Court will not expand it further. Accordingly, the Court holds Plaintiff does not have standing to pursue assigned claims for payment of ERISA benefits. Defendants' ***96** Motions to Dismiss Plaintiff's ERISA claims are GRANTED without leave to amend.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN SIMON, an individual and as assignee of assignors, Plaintiff-Appellant, v. VALUE BEHAVIORAL HEALTH, INC., GUARDIAN LIFE INSURANCE OF AMERICA; VALUE HEALTH INC.; ROBERT E. PATRICELLI, LTD; AMERICAN PSYCHMANAGEMENT, INC; PREFERRED HEATLHCARE, LTD; HEALTH MANAGEMENT STRATEGIES INTERNATIONAL, INC.; THE PRUDENTIAL INSURANCE COMPANY; HEALTHCARE SYSTEMS, INC.; HEALTH RISK MANAGEMENT OF AMERICA; JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY; JOHN ALDEN LIFE INSURANCE COMPANY; COSTCARE, INC.; JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY EMPLOYEE BENEFIT PLAN; BLUE	No. 98-55905 D.C. No. CV-96-0711 GLT ORDER

CROSS & BLUE SHIELD ASSOCIATION; BLUE CROSS & BLUE SHIELD OF ILLINOIS, INC.; BLUE CROSS/BLUE SHIELD OF IOWA, INC.; BLUE CROSS/ BLUE SHIELD OF KANSAS, INC.; BLUE CROSS/BLUE SHIELD OF MASSACHUSETTS, INC.; BLUE CROSS/BLUE SHIELD OF MICHIGAN, INC.; EMPIRE BLUE CROSS/BLUE SHIELD; NEW YORK LIFE INSURANCE COMPANY; BLUE CROSS/BLUE SHIELD OF TEXAS, INC., Administrator and/or Trustee on Behalf of Paune Extrusions Company Employee Benefit Plan; BLUE CROSS/BLUE SHIELD OF VIRGINIA, INC., Administrator and/or Trustee on Behalf of Commonwealth University Employee Benefit Plan, Metro Inc. Information Services Employee Benefit Plan, Department of Motor Vehicles of the Commonwealth of Virginia Employee Benefit Plan, Linsky Plant Farm, Inc. Employee Benefit Plan, Memorial Hospital, Inc., Employee Benefit Plan, Virginia Polytechnic Institute and State University Employee Benefit Plan, Campbell County Transport Employee Benefit Plan, Hodgerman's Company Employee Benefit Plan, AMERICAN

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GENERAL LIFE & ACCIDENT INSURANCE CO., Administrator and/or Trustee on Behalf of American General Life & Accident Insurance Company Employee Benefit Plan; BENEFIT TRUST LIFE, Administrator and/or Trustee on Behalf of Lagrange Country Club, Inc. Employee Benefit Plan, Wood Tech, Inc. Employee Benefit Plan; BLUE CROSS OF ALASKA; BLUE CROSS OF WASHINGTON; SPECIALTY MEDICAL CLINIC EMPLOYEE BENEFIT PLAN, BELL ATLANTIC CORPORATION: C & P TELEPHONE; TUTHILL CORPORATION; FKW, INC; BLUE CROSS/BLUE SHIELD OF MINNESOTA; BLUE CROSS/BLUE SHIELD OF MAINE; BANKERS LIFE AND CASUALTY COMPANY; NATIONAL ASSOCIATION OF HEALTH UNDERWRITERS; CITY OF LEWISTON SCHOOL DEPARTMENT RELIASTAR LIFE INSURANCE COMPANY; PPG INDUSTRIES, INC.; VENTURA INSURANCE ADMINISTRATORS, INC.; VENTURA COUNTY FOUNDATION FOR MEDICAL CARE, INC.; A & P GROCERY STORE, INC.; A & P GROCERY STORE, INC. EMPLOYEE BENEFIT PLAN; CRAWFORD

INSURANCE COMPANY; SECURITY BENEFIT TRUST FUND, ROOFERS LOCAL 149 SECURITY BENEFIT TRUST FUND; ROOFERS LOCAL 149 EMPLOYEE BENEFIT PLAN; ITT HARTFORD GROUP, INC., ITT HARTFORD GROUP, INC., As Administrator and/or Trustee; GENERAL AMERICAN LIFE INSURANCE COMPANY; GENELCO; PAN AMERICAN LIFE INSURANCE COMPANY; NATIONAL INSURANCE SERVICES; DAVID KOPPE; WILLIAM McGUIRE M.D.; METRAHEALTH CARE MANAGEMENT CORPORATION; UNITED HEALTHCARE CORPORATION; UNITED HEALTHCARE CORPORATION EMPLOYEE BENEFIT PLAN; UNITED HEALTHCARE SERVICES, INC.; UNITED BEHAVIORAL SYSTEMS, INC.; OPERATING ENGINEERS LOCAL 37 HEALTH AND WELFARE FUND; CAPPCARE, INC.; MICHAEL HENRY; HEALTH INTERNATIONAL, INC.; erroneously sued as HEALTH INTERNATIONAL CORP.; STANISLAUS FOUNDATION FOR MEDICAL CARE; EXECUTIVE RISK; BENEFIT PANEL SERVICES; GREAT-WEST LIFE ASSURANCE COMPANY; ROCKY MOUNTAIN

MEDICAL SERVICES, dba BLUE CROSS AND BLUE SHIELD OF COLORADO; CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA, CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA; CARPENTERS SOUTHERN CALIFORNIA ADMINISTRATIVE CORPORATION; MILLWRIGHTS LOCAL UNION NO. 1607; CARPENTERS LOCAL UNION NO. 1506; CHICAGO DISTRICT COUNCIL OF CARPENTERS WELFARE FUND; CHICAGO DISTRICT COUNCIL OF CARPENTERS PENSION FUND; RETAIL CLERKS-EMPLOYERS BENEFIT PLANS OF NORTHERN CALIFORNIA AND VALLEY CLERKS TRUST FUND; CT CORPORATION, CSC THE UNITED STATES CORPORATION; BLUE CROSS/ BLUE SHIELD OF CALIFORNIA; METROPOLITAN LIFE INSURANCE COMPANY, Administrators and/or Trustee on Behalf of: Sears, Roebuck & Co. Group Medical Plan, Chemical Bank, Inc. Employee Benefit Plan, New York State Freeway Authority Employee Benefit Plan, New York State Department Civic Employee Benefit Division, Tenneco/J.I. Case

Co. Employee Benefit Plan, Sun Chemical Corporation Employee Benefit Plan, Dunn & Bradstreet Employee Benefit Plan, Rockwell International, Inc. Employee Benefit Plan, ZEP Manufacturing Company Employee Benefit Plan, National Services Industries, Inc. Employee Benefit Plan, F.W. Woolworth Company Employee Benefit Plan, Nordstrom's Inc. Employee Benefit Plan, Town of New Paltz Employee Benefit Plan, Trustees of the American Engineers Council Treasure Trust Fund, Felker Benefit Services, Pepsico, Inc. Employee Benefit Plan, Ukiah Unified School District Employee Benefit Plan, Louisiana-Pacific Inc. Employee Benefit Plan, General Electric Company Employee Benefit Plan, Proctor & Gamble Corporation Employee Benefit Plan, City of Culver Employee Benefit Plan, California Conservation Corp Employee Benefit Plan, Allcare Plan, Transport International Tools, Inc. Employee Benefit Plan, Wood Company Employee Benefit Plan, Montgomery Ward, Inc. Employee Benefit Plan, R.H. Macy's, Inc. Employee Benefit Plan, McDonough Capperton, Inc. Employee Benefit

Plan, Toys R Us, Inc. Employee Benefit Plan, J.I. Case Power & Equipment, Inc. Employee Benefit Plan; METRAHEALTH, WILLIAM W. MCGUIRE, M.D.; DAVID KOPPE; UNIFIED BEHAVIORAL SYSTEMS, INC.; NATIONAL ASSOCIATION OF LIFE UNDERWRITERS; SOUTHWESTERN BELL EMPLOYEE BENEFIT PLAN; UNIVERSAL CITY STUDIOS, INC., UNIVERSAL STUDIOS EMPLOYEE BENEFIT PLAN; MUTUAL OF OMAHA; HEALTHCARE COMPARE CORPORATION; HEALTH RISK MANAGEMENT, INC.; BENEFIT ADMINISTRATORS, INC.; CARE AMERICA, INC.; UNIFORMED SERVICE BENEFIT PLAN, INC.; U.S. POSTAL SERVICE; YUMA PROVING GROUND; U.S. ARMY; U.S. MARINE CORPS; U.S. NAVY; U.S. AIR FORCE; U.S. COAST GUARD; UNITED STATES OF AMERICA; FIRST HEALTH, INC.; GREAT WEST LIFE ASSURANCE COMPANY; BLUE CROSS/BLUE SHIELD OF ALABAMA SERVICE MASTER, INC. EMPLOYEE BENEFIT PLAN; GARY METHODIST HOSPITAL, INC. EMPLOYEE BENEFIT PLAN; LEWISTON SCHOOL; MAINE STATE CORRECTIONAL INSTITUTION

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EMPLOYEE BENEFIT PLAN; BLUE CROSS/BLUE SHIELD OF OREGON, INC., Administrator and/or Trustee on Behalf of: Safeway Stores, Inc. Employee Benefit Plan, Painters Local 10 Employee Benefit Plan, John Q. Hammonds Hotels, Inc. Employee Benefit Plan; ADVENTIST HEALTH SYSTEM OF LOMA LINDA, Administrator and/or Trustee on Behalf of Loma Linda School of Medicine Health Assistance and Medical Personnel Services Plan; LOMA LINDA SCHOOL OF MEDICINE HEALTH ASSISTANCE AND MEDICAL PERSONNEL SERVICES PLAN; UNITED CHAMBERS INSURED PLANS; AMERICAN GENERAL LIFE & ACCIDENT INSURANCE CO., Administrator and/or Trustee on Behalf of American General Life & Accident Insurance Co. Employee Benefit Plan; AMERICAN COMMUNITY MUTUAL INSURANCE CO.; AMERICAN TRUST ADMINISTRATORS; AUTOMOTIVE INDUSTRIES WELFARE FUND MEDICAL PLAN, BROWN GROUP INSURANCE CO., Administrators and/or Trustee on Behalf of Brown Group Insurance

Co. Healthcare Plan; BANKERS LIFE & CASUALTY COMPANY, Administrator and/or trustee on Behalf of City of Chicago Employee Benefit Plan; THE VOLLRATH COMPANY, INC. THE VOLLRATH COMPANY, INC. EMPLOYEE BENEFIT PLAN; CHUBB LIFE AMERICA; COMPARITIVE INS SERV; MCDONNELL DOUGLAS CORP./DOUGLAS AIRCRAFT COMPANY; SCREEN ACTORS GUILD-PRODUCERS PENSION PLAN; SWIN CHEM PRODUCTS, INC., GREAT LAKES CHEMICAL, INC.,; BL NETWORK, INC. EMPLOYEE BENEFIT PLAN; GROUP RESOURCES, INC.; HARCOURT BRACE JOVANOVICH, INC.; HEALTH ECONOMICS CORPORATION; CITY/COUNTY OF SAN FRANCISCO; INSURANTIONAL INSURANCE ADMINISTRATORS, INC.; INTERMOUNTAIN ADMINISTRATORS, INC.; LABORERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA; MCDOWELL AGENCY INC.; MUTUAL ASSURANCE; SAN FRANCISCO PRINT INDUSTRY WELFARE FUND, and Newspaper & Periodical Driver's & Helper's Union

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Local 921 - Publisher's Welfare Trust
PAVERS AND ROAD BUILDERS DISTRICT COUNCIL WELFARE FUND; JACK WICKWARE; IBEW-NECA SOUTHWESTERN HEALTH AND BENEFIT FUND; WAL-MART, INC.; WAL-MART, INC. ASSOCIATES GROUP HEALTH PLAN STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; GROUP HEALTH INCORPORATED; FEDERATED MUTUAL INSURANCE COMPANY; EUROPEAN CARE PARTS, INC.; EMPLOYEE BENEFIT PLAN; F.W. WOOLWORTH COMPANY EMPLOYEE BENEFIT PLAN; F.W. WOOLWORTH CO.; PAULA ASSURANCE CO.; PAN AMERICAN UNDERWRITERS, INC.; GALLAGHER BASSETT SERVICES, INC.; EMPLOYEE BENEFITS ADMINISTRATION AND MANAGEMENT CORPORATION; MILK & ICE CREAM EMPLOYEES WELFARE PLAN; BLUE CROSS BLUE SHIELD OF DELAWARE, Blue Cross Blue Shield of Kentucky; Blue Cross Blue Shield of New Jersey; Blue Cross/Blue Shield of Connecticut; UNITED INSURANCE COMPANY OF AMERICA; NALC HEALTH BENEFIT PLAN; INDIANA

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CHILD PROTECTIVE SERVICES;
NORTHERN INDIANA STATE
DEVELOPMENTAL CENTER;
NORTHERN INDIANA STATE
DEVELOPMENTAL CENTER;
COLUMBIA HCA HEALTHCARE
CORPORATION;

Defendants-Appellees

Before: D.W. NELSON and RYMER, Circuit Judges:

Judges D.W. Nelson and Rymer have voted to deny the petition for rehearing. Judge Rymer votes to deny the petition for rehearing en banc and Judge D.W. Nelson so recommends.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on whether to rehear the matter en banc Fed. R. App. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

Simon's request for modification of the opinion and motion for stay of mandate are DENIED.

The panel concludes that there is no merit to Simon's argument that this court lacks jurisdiction, and to the extent that his argument can be construed as a motion to dismiss, it is DENIED.

IF THE SUPREME COURT ALLOWS PATIENTS TO SUE HMOs, HOW WILL WE HANDLE IT?
WE COULD STOP DENYING LEGITIMATE CLAIMS AND PUT HEALTH CARE BEFORE PROFITS.
HMO
YEAH, RIGHT. OK, ANY OTHER IDEAS?
HMO
MIKESMITH

APPENDIX D

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